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Source: *Daedalus*, Summer, 2004, Vol. 133, No. 3, On Progress (Summer, 2004), pp. 5-9

Published by: The MIT Press on behalf of American Academy of Arts & Sciences

Stable URL: <https://www.jstor.org/stable/20027924>

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Comment by Sanford Levinson

Torture in Iraq & the rule of law in America

Doubts about the legal and moral legitimacy of American interrogation practices in the war on terror first emerged in regard to Afghanistan. In January of 2003, for example, *The Economist* published a remarkable set of articles on torture, detailing some of America's more dubious practices. Yet as the editors of *The Economist* noted, within the United States itself the discussion of torture was "desultory."

That all changed in May of 2004, when the CBS television program *60 Minutes* and *The New Yorker* released photographs from the Abu Ghraib prison in Iraq. These pictures provoked worldwide outrage and, even more importantly, sparked a long overdue public debate in the United States about torture and the permissible limits of interrogation in the aftermath of the September 11 attacks.

As one might expect in a legalistic culture such as ours, some of this debate has revolved around the definition of torture itself. Common lay understandings of torture are in fact quite different from those articulated by many American lawyers. One reason is that the U.S.

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Senate, when ratifying in 1994 the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, offered what one might call a more 'interrogator-friendly' definition of torture than that adopted by the UN negotiators. Thus the Senate, as is its prerogative, stipulated while consenting to the Convention that

the United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict *severe* physical or mental pain or suffering and that mental pain or suffering refers to *prolonged* mental harm caused by or resulting from: the intentional infliction or threatened infliction of *severe* physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to *disrupt profoundly* the senses or personality; the threat of *imminent* death; or the threat that another person will *imminently* be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to *disrupt profoundly* the senses or personality. (emphases added)

Each and every term I have italicized here in the 1994 Senate resolution was diligently parsed in the recently disclosed Pentagon "Working Group Report on Detainee Interrogations in the Global War on Terrorism," submitted in March of 2003 to Secretary of Defense Donald Rumsfeld. Given the Senate's

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highly qualified endorsement of the UN Convention, it is not at all surprising that the report submitted to Rumsfeld appears to have maximized the scope of authority (and power) allowed American interrogators who wish to operate within the law.

The Pentagon report closely followed an analysis submitted to White House Counsel Alberto Gonzales in 2002 by the Office of Legal Counsel (OLC) within the Justice Department. According to the OLC, “acts must be of an extreme nature to rise to the level of torture.... Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The infliction of anything less intense than such extreme pain, according to Jay Bybee, then head of the OLC (and now a federal judge on the Ninth Circuit Court of Appeals), would not, technically speaking, be torture at all. It would merely be inhuman and degrading treatment, a subject of little apparent concern to the Bush administration’s lawyers.

The current debate has sometimes gone beyond terminological quibbles. In the past few months, some experts have forthrightly defended the propriety of torture, however defined, at least in some very limited situations. Harvard Law professor Alan Dershowitz, who has taken such a position, nonetheless is extremely concerned to minimize the use of torture. He has, therefore, vigorously defended the idea that the executive branch should be forced to go to independent judges in order to obtain “torture warrants,” which could be issued only after careful examination of executive branch arguments as to the ostensible necessity of torture in a given instance.

Still other experts, including Dershowitz’s Harvard colleague Philip Heymann and U.S. federal judge Richard Posner, have disagreed, arguing that such warrants would inevitably prove chimerical as a genuine control and would instead normalize torture as an interrogational tool. Perhaps torture is proper under very restricted circumstances, as Posner in particular agrees, but far better that it be defended *ex post* (after the fact) through specific claims of necessity or self-defense than *ex ante* (before the fact) through the issuing of a warrant.

This debate has been informed both by current events and, for some, by the views of the men who drafted the U.S. Constitution. On the one hand, there is a growing sense (articulated by writers like Philip Bobbitt) that war in the future, at least where the United States is concerned, is unlikely to fit the traditional pattern of threats by states, and is far more likely to involve threats from organizations that have no capitals at which traditional retaliation can be directed.¹ Rules and understandings developed to constrain the conduct of wars between states – where, among other things, mutual self-interest dictates limits on what can be done even to one’s enemies – may be inadequate or even, as suggested by White House Counsel Gonzales in a memorandum to the president, “obsolete” in regard to the so-called asymmetric warfare of the twenty-first century. Such new modes of warfare require that we rethink our basic approach to waging war – and also the basic principles of law and morality.

On the other hand, it is equally important to grasp just what the basic prin-

¹ See Philip Bobbitt’s magisterial study, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Knopf, 2002).

ples of law and morality have been in the United States. As recent work on the origins of the U.S. Constitution has demonstrated, the founding fathers hoped to create a government strong enough to defend the fledgling nation against its many potential enemies, including European powers as well as Indian tribes much closer to home.² Among the key provisions of the 1787 Constitution were those authorizing a standing army and effectively unlimited taxing authority to Congress to pay for “the common defense.”

James Madison and Alexander Hamilton, for all their notable differences, seemed to be in agreement on the importance of this point. Thus Madison, in *Federalist No. 41*, asked if it was “necessary to give [the new government] an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE as well as in WAR?” He believed that the answer was “so obvious and conclusive as scarcely to justify” any real discussion of anti-Federalist criticisms of the very idea of a standing army. The United States had to structure its own policies by anticipating the likely actions of other states: “The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others.” Hamilton expressed a related conviction in *Federalist No. 23*: “[I]t must be admitted as a necessary consequence that there *can be no limitation of that authority* which is to provide for the defense and protection of the community in any matter essential

to its efficacy – that is, in any matter essential to the *formulation, direction, or support of the NATIONAL FORCES*” (first emphasis added). Thomas Hobbes could have done no better in defending the absolute authority of the sovereign.

The Constitution may proclaim that sovereignty rests with “We the People.” But the implication of both Madison’s and Hamilton’s arguments is that, practically speaking, at least in times of war, sovereignty really rests with a handful of government officials – not with “the People.”

Now consider the following maxim: “There exists no norm that is applicable to chaos.” It comes not from Madison or Hamilton, but from Carl Schmitt, the leading German philosopher of law during the Nazi period. Schmitt contended that legal norms were only applicable in stable and peaceful situations – and not in times of war, when the state confronted “a mortal enemy, with the threat of violent death at the hands of a hostile group.” It follows that conventional legal norms are no longer applicable in a state of emergency, when war and chaos pose a standing threat to public safety. To adopt the language of American constitutional law, every norm is subject to limitation when a compelling interest is successfully asserted, and it is hard to think of a more compelling interest than the prevention of violent death at the hands of a hostile group.

But what this means is that one can never have confidence that *any* particular constitutional norm – beyond that of preserving the state itself – will be adhered to. Any attempts within the Constitution to tie the government’s hands with regard to defending the nation, then, may be mere “parchment barriers,” to use Madison’s dismissive term (which he conceived during the period

² See particularly David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University of Kansas Press, 2003); and Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003).

when he doubted the wisdom of adding a Bill of Rights to the Constitution). Both Madison and Schmitt suggest, then, the most likely response to such barriers is a “*necessary usurpation of power*” (as Madison put it in *Federalist* No. 41; emphasis added).

Schmitt, described by Herbert Marcuse as the most brilliant Nazi theorist, may have much to tell us about the legal world within which we live and, even more certainly, seem to be careening. Although some analysts have suggested that the Bush administration has operated under the guidance of the ideas of German émigré Leo Strauss, it seems far more plausible to suggest that the true *éminence grise* of the administration, particularly with regard to issues surrounding the possible propriety of torture, is Schmitt.

September 11, it is said, changed everything. What this means, among other things, is that for many the existing world of ‘the normal’ vanished in an instant, to be replaced by the specter of terrorist groups armed with weapons of mass destruction. And what *this* means is that pre–September 11 norms and expectations are being reconfigured in terms of this new ‘normality’ of endless, frightening threats posed by ‘a mortal enemy.’ Ordinary norms – whether the assumption that anyone arrested by American police will have an opportunity to consult with a lawyer, or the assumption that the United States will be faithful to its public pronouncements denouncing torture (as well as to its commitment under the UN Convention absolutely to refrain from torture whatever the circumstances) – are now up for grabs. “Sovereign is he,” wrote Schmitt, “who decides on the state of the exception,” or, much the same, who is allowed to redescribe what is ‘normal.’

Administration lawyers whose memoranda have only recently been disclosed

seem completely willing to view George W. Bush as the de facto sovereign. Their documents display what can only be called contempt not only for international law, but also for the very idea that any other institution of the American government, whether Congress or the Judiciary, has any role to play. Thus both the Working Group Report submitted to Secretary Rumsfeld and the memorandum prepared earlier by the OLC argued that the Constitution’s designation of the president as commander in chief means that “the President enjoys *complete discretion* … in conducting operations against hostile forces” (emphasis added). Complete discretion, of course, is a power enjoyed *only* by sovereigns. Non-sovereigns, by definition, are subject to the constraint of some overriding authority. The president, according to administration lawyers, has no authority to which he must answer. Prohibitions of international and domestic law regarding the absolute impropriety of torture simply do not apply to him. “In order to respect the President’s inherent constitutional authority to manage a military campaign, [federal laws against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority,” the OLC advised. “Congress lacks authority … to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.”

It is impossible to predict whether these quite astonishing arguments (which seem to authorize the president and designated subordinates simply to make disappear those they deem adversaries, as happened in Chile and Argentina in what the Argentines aptly labeled their “dirty war”) would prevail before a court of law. We shall know more after

the Supreme Court rules in several cases it heard in the spring of 2004 regarding the detention in Guantanamo of foreign combatants and at least one American citizen (Jose Padilla, who has been accorded almost no legal rights since his 2002 arrest at O'Hare International Airport).

Far more important, however, is the articulation, on behalf of the Bush administration, of a view of presidential authority that is all too close to the power that Schmitt was willing to accord his own Führer.

One temptation is to stop right here, especially if one shares my own doubts about both George W. Bush and the war in Iraq. But that would be too easy, for a number of reasons. One is that there *are* mortal enemies of the United States who *do* threaten violent death. No political leader could suggest that it is *not* a compelling interest to prevent future replications of September 11. Moreover, as already indicated, one can cite not only the egregious (though brilliant) Schmitt, but also such American icons as Madison and Hamilton for views that are not really so completely different from those enunciated by the Bush administration.

And so we already have many well-credentialed lawyers, several of them distinguished legal academics, who are quick to defend everything that is being done (or proposed) by the Bush administration as passing constitutional muster. They have enlisted in defending a war on terror that is almost certainly of infinite duration. They appear recklessly indifferent to the fact that their arguments, if accepted, would transform the United States into at least a soft version of 1984, where our own version of Big Brother will declare to us who is our enemy *du jour* and assert his own version of a “triumph of the will” to do everything and anything – including torture – in order to prevail.

A final quotation from Carl Schmitt is illuminating: “A normal situation has to be created, and sovereign is he who definitively decides whether this normal state actually obtains. All law is ‘situation law.’ The sovereign creates and guarantees the situation as a whole in its totality. He has the monopoly on this ultimate decision.” This is precisely the argument being made by lawyers within the Bush administration.

The debate about torture is only one relatively small part of a far more profound debate that we should be having during this most important of election years. Do “We the People,” the ostensible sovereigns within the American system of government, accept the vision of the American president articulated by the Bush administration? And if we do, what, then, is left of the vaunted vision of the rule of law that the United States ostensibly exemplifies?

– June 21, 2004